1944. **File No.** O. Boroagh/44

Legal Department

A **BRANCH**

Subject:— Opinions under the Bombay Municipal Boroughs Act, 1925

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File No. O - Boroughs/44

Gen. 191 c.

69-A

C O N T E N T S.

Legal Department File No. C. Boroughs /1944.

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SA/16/8

C O N T E N T S.

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13)	C.No. 9082/23-12-44.	Secs. 75 and 102- Sholapur Municipality whether Govt. can suspend operation of revised rules made by the - leving general water rate in the care of Mills, factories etc.- Whether the proper course would be to in-form the Municipality of the complaint made by the Mills owners and to ask it to show cause why action should not be taken under section 102---	37-38.

Dr.
Office of the P.L.A.

The question for the consideration of the P.L.A. is whether the Provl. Govt. in which the property of the Ahmedabad Municipality has vested under clause(c) of rule 38B(2) of the D of I Rules should be an executing party to the sale deeds along with the Administrator appointed under clause (b).

The Administrator of the Ahmedabad Municipality appointed under clause(b) of rule 38B(2) of the Defence of India Rules is entitled to exercise and perform all the powers and duties which may be or under any law for the time being in force be exercised or performed by or on behalf of the Municipality. Under section 48(1) of the Bombay Municipal Boroughs Act, 1925 it is competent for a municipality to sell any property which has become vested in or been acquired by it and to enter into and perfom all such contracts as it may consider necessary or expedient for the purpose. The Administrator of the Ahmedabad Municipality would therefore by virtue of clause (b) of rule 38B(2) of the Defence of India Rules be entitled to exercise the powers of the municipality under section 48(1) of the Bombay Municipal Boroughs Act and to execute sale-deeds. It is true that during the period of supersession the property of the Ahmedabad Municipality vests in Government under clause (c) of rule 38B(2) of the Defence of India Rules; but "this vesting is only for the purposes of Municipality and the right title and interest of the Municipality in the properties belonging to the Municipality can always be proceeded

against the execution of the decree". (A.G.'s opinion dated 12-4-43). It is ~~xxx~~ true that during the period of supersession of the Ahmedabad Municipality in 1911-1915 when Mr. Bhaishankar Nanabhai ~~X~~ executed a trust in endowment of certain institutions of the Municipality, the Secretary of State was, on the advice of the P.L.A. in his opinion No. 3087 dated 11-111912 made a party also to the execution of endowments. But the subsequent opinion of the P.L.A. (No. 2567 dated 22-9-1913) also shows that Government need not be a party to such deeds. Even on facts the opinion of the P.L.A. No. 3087 dated 11-11-1912 appears to be distinguisable. In that case the Secretary of State was required to stipulate that on the reestablishment of the Ahmedabad Municipality he should procure from that body a covenant accepting and confirming the trust therein mentioned. In the case of sale-deeds which are required to be excated there is no condition requiring Government to do something on the restoration of the Municipality. Government need not be a party to any of the sale-deeds which the Administrator proposes to execute on behalf of the Municipality.

Id/- P.N.P.
6/1/44.

Remembrancer of Legal Affairs.

U.O.R. to General Department, No. 134, dated the 8th January 1944.

N.V.D.
11/7
4c.

Office of the R.L.A.

The view of the Collector of Ahmedabad and the Administrator regaring the composition of Municipal Committees is correct. The rules contemplated are a measure to control or regulate the potato trade rather than a measure to regulate the sale of potatoes in the municipal markets and other specified places. Section 61(1)(a) of the Bombay Municipal Boroughs Act, 1925, provides for regulating the sale of fruit and vegetables in the Municipal markets etc. "Regulating the sale" is not, of course, an exact term. But in the last the R.L.A. has tended to take a narrower view of those words than the present contemplated rules require. I therefore agree with the Administrator that the rules go beyond the scope of section 61(1).

Sd/-

Remembrancer of Legal Affairs.

U.P. to G.D., No. 1674, dated the 3rd March 1944.

N.V.D.
11/7
4c.

Office of the P.L.A.

It appears that the term of a portion of the Bombay Agra Road passing through Dhulia town is used by carts as a resting place for bazar work and consequently rubbish, rain water etc. stagnate there and render the area insanitary. The Dhulia Municipality was advised to construct a drain along the road in order to remove the insanitary conditio But the Municipality declined to accept the responsibility for constructing a drain on the ground that the road in question vests in Governmen . The questions referred to the P.L.A. are -

(1) whether it is obligatory on the Dhulia Municipality (a) to cleanse the road and (b) to construct a drain along the road; and

(2) whether the liability can be enforced under section 218 of the Bombay District Municipal Act, 1925.

Clause(c) of section 68(1) of the Bombay Municipal Boroughs Act, 1925 inter alia provides th at it shall be the duty of every municipality to make reasonable and adequate provision for cleansing public stre-ets and abating all public nuisance. The portion of the Bombay Agra Road passing through Dhulia town, though maintained by Government is a public street within the meaning of section 3(16) of the Act. Consequently the Dhulia Municipality is bound to cleanse that part of the road which is rendered insanitary by the resting of the bullock carts (see P.L.A.'s opinion No. 4871) dated 22-5-1940).

Under clause(i) of section 68(1) it is also one of the obligatory duties of every municipality to construct, alter and maintain public streets culverts etc. latrine, privies, urinals, drains, sewers, drainage works, sewerage work etc. "Drains" in that

clause appear to mean public drains i.e. drains other than those constructed or laid from any private building or land (see section 129(1) of the Act). "Land" and "public Street" are separately defined in the Act (see section 3(8) and (16) of the Act). Consequently the term "land" insection 129(1) may not include a public street. It is doubtful whether the construction of a drain by the side of a road vesting in and maintained by Government in a municipal area can be considered to be obligatory under clause(1) of section 68(1). If the drain is necessary in order to cleanse the road or to abate public nuisance, it would then become obligatory under clause(c) of section 68(1); but that case may be the exception. The Government Resolution, No 5328/36 dt. 26th June 1941 quoted both the Comm. & D. & P.W.D. P.W.D./ appears to be more in favour of the view that it is not an obligatory duty of the Municipality to reconstruct foot paths, gutters and side drains on provincial roads passing through the municipal area; for it says that the municipalities must pay the whole cost of work such as the modernising or dust proofing of berms or the provision of foot paths gutters or side drains, which they may wish to have carried out on such roads.

Section 218 empowers the Provincial Government to provide for performance of duties on default by Municipality. Consequently the liability to cleanse the road under clause(c) of section 68 can be enforced under section218. Since however clause(1) of section 68(1) doesnot expressly impose the liability on a municipality ~~xxx~~ to construct drains on roads maintained by Govern ent in municipal areas action under section 218 wouldbe inadvisable to enforce the liability of Dhulia Municipality to construct a drain along the portionof the Bombay Agra Road passing through Dhulia town unless the drain is necessary to cleanse the area in question.

Id/- P.N.H. 9/5/44.
Remembrancer of Legal Affairs.

Office of the P.L.A.

Section 215 of the Bombay Municipal Boroughs Act, 1925 has no application to the present case. Power to appoint a chief Officer vests in the Godhra Municipality under section 33; and the Act contains no provision empowering Government to require a municipality to appoint a particular person as its Chief Officer. Consequently it would not be competent either for Government or for any authority to appoint Mr. Kothi as Chief Officer of the Godhra Municipality, or to require the Municipality to make its own selection for appointment as Chief Officer provided the provisions of section 33(1) are complied with. The view taken by under Secretary, G.D. at page 20 is not correct.

It would be open to the munic to make its own selection for appointment as chief officer

Id/- P.N.M. 24/6/44.
Remembrancer of Legal Affairs.

U.P. to G.D., No. 4473, dated the
26th June 1944.

N.V.D.
11/7
4c.

To make provision for antimalaria survey is not an obligatory duty under section 68 of the Bombay Municipal Boroughs Act, 1925 but a discretionary one falling under cl.(r) of section 71.

Sd/- R.T.K. 28/7

A.L.P.

I agree.

Reply may be S.A.S'd note.

Sd/-P.S.H.

P.L.A.

I agree.

Sd/- P.N.H. 3/8

U.R. to G.D. No. 5526 dated 7th August 1944.

N.V.D.
11/7
4c.

Office of the P.L.A.

Mr. J.J. Shah a Government servant was in 1940 appointed Chief Officer of the Godhra Municipality. Mr. Shah has reverted to British Service as it was his turn to officiate as Mahalkari of Halol and the question therefore of a pointing another Government servant in place of Mr. Shah has arisen. The Collector suggested to the Municipality that it should appoint Mr. Kothi as Chief Officer in view of Goverbment Memorandum General Department No. 3760/ 33-A dated 25th March 19.0. The Municipality however passed the following resolution on 19th April 1944.

"But now the Municipality does not wish to appoint a Government servant as its Chief Officer and intends to appoint its own Chief Officer under the powers vested in it Vide section 33 of the Municipal Borough Act XVIII of 1925. Still however if the Collector directs appointment of any Government servant as chief Officer of this Municipality, the President should not hand over the charge of Chief Officer without previous approval of the General Board."

with reference to this resolution the Collector of Broach and Panch Mahals passed an order under his No. G.M.Y., dated 25th April 1944 suspending the execution of the resolution under section 214(1) of the Bombay Municipal Boroughs Act, 1925. The relevant protion of the order is as follows:-

"Inspite of clear directions of Government to ask for a loan of a Government servant as its Chief Officer, the General Board on 19th April 1944 have resolved not to hand over charge to a Government servant appointed to hold the post. The resolution is thus unlawful as it contravenes the clear directions of Government."

"I, therefore, hereby order that the execution of the resolution be suspended under section 214(1) of the Bombay Municipal Boroughs Act."

The Collector forwarded a copy of the order to the Commissioner as required by section 214(2) of the Act. The Commissioner, N.D. confirmed the order of the Collector in the following terms:-

"The Commissioner therefore in exercise of the powers conferred by sub-section (2) of section 214 of the M.B. Act directs that the Collector of Broach and Panch Mahals' order No. G.M.Y., dated 25th April 1944 shall remain in force without modification until the resolution is cancelled by the Municipality."

The Municipality passed the folllowing resolution on 26th May 1944:-

"That Mr. Kothi be appointed as Chief Officer as suggested by the Collector."

This resolution was passed by a majority, 6 voting for the resolution and 5 against. The Collector is of opinion that the resolution of 26th May 1944 is invalid because it was passed within 3 months of the resolution of 19th April 1944 which it in effect cancels. The two questions for the consideration of the P.L.A. are (1) whether the resolution passed on 26th May 1944 is invalid and (2) whether the first resolution passed on 19th April 1944 can be said to be ineffective and inoperative in view of the fact that the Collector and the Commissioner have suspended its execution.

2. Section 35(12) of the Bombay Municipal Boroughs Act 1925, provides that no resolution of a municipality shall be modified or cancelled within three months after the passingthereof, except by a resolution supported by not less than one-half of the whole number of councillers and passed at a general meeting etc. The question is whether this provision applies to a resolution whose execution has been suspended under section 214 of the Act.

Obv

Obviously a case can be made out for exempting such suspended resolutions from the provisions of section 35 (12). But there appears to be no provision in the Act either express or implicit which serves to exempt such resolutions. The resolution whose execution is suspended does not by the suspension become a nullity. When Government's order of suspension is rescinded then the suspended resolution will revive and have effect. It appears that the suspended resolution still remains a resolution for the purpose of section 35(12) and will be subject to the three months rule. Further it has been pointed out in P.L.A.'s opinion No. 4473 dated 26th June 1944 that Government is not competent to foist a Government servant upon an unwilling municipality as its Chief Officer. The order of suspension passed by the Collector and confirmed by the Commissioner is very difficult to justify and in view of its questionable validity it is doubtful if the municipal resolution of 19th April 1944 can be held to have been legally suspended. This is another argument in favour of the view that in this case section 35(12) of the Act applies. The safest course would certainly be to advise the Municipality to pass a fresh resolution appointing Mr. Kothi as its Chief Officer.

Sd/-P.N.M.

25/9/44.

Remembrancer of Legal Affairs.

U.P. to G.D., No. 5987, dated the 26th August 1944.

N.V.D.
11/7
4c.

Office of the P.L.A.

A municipality whether Governed by the Bombay District Municipal Act, 1901, or the Bombay Municipal Boroughs Act, 1925, may impose for the purposes of the Act any of the taxes specified in section 59 of the former Act or section 73 of the latter Act. One of the taxes so specified is an octroi on goods brought within the octroi limits for consumption or use therein. Proviso (a) to sub-section(1) of section 59 of the Bombay District Municipal Act, 1901 (which is analogous to proviso (a) to section73(1) of the Bombay Municipal Boroughs Act, 1925) enacts that no tax other than (i) a special sanitary cess, (ii) a drainage tax or (iii) a water rate shall, without the consent of the ~~Exemxxks~~ Crown be leviable in respect of any building or part of any building or of any vehicle, animal or other property belonging to His Majesty and used solely for public purposes and not used or intended tobe used for purposes of profit etc.

2. A public purpose is one which relates to or benefits the public at large. It includes any object which secures the good of the public. In the present case the foodgrains purchased by Government for the public good and are brought into municipal limits not with a view to any profit but with a view to implementing their food rationing scheme and securing the equitable distribution of foodgrains imported by Government were being used solely for public purposes viz., for public consumption. Viewed in that light the local authority would have no power to levy octroi limits for consumption or use therein without Government consent. The same would be the case if foodgrains were imported for famine relief or to feed troups stationed in that area. It is however a matter for the administrative Department to consider whether on

whether on equitable grounds Government should accord its consent to the levy of octroi on foodgrains imported within municipal limits.

Sd/- P.N.A.

15-8-44.

Remembrancer of Legal Affairs.

U.F. to G.D. No. 5801, dated the 17th August 1944.

N.W.D.
11/7
40.

Office of the E.L.A.

The Bandra Municipality has requested the Consulting Surveyor to the Government of Bombay to assess certain buildings under section 74 of the Bombay Municipal Boroughs Act, 1925. The buildings are used by His Majesty's Defence Services and have been constructed by the M.E.D., On the analogy of orders issued in G.M.G.D. No. 6765-A dated the 15th November 1928, under which Military Finance Office of the Army Department at Poona, was held, to be exempt from taxation under section 73(a) of the Bombay Municipal Boroughs Act, 1925, the C.D. office holds that the buildings in question are also exempt under section 73(a). The Bandra Municipality also appears to admit this exemption from taxation under section 73(a). The question, however, remains whether the buildings can be taxed under section 74(2) of the Bombay Municipal Boroughs Act.

2. In order to incur liability under section 74(2) of the Bombay Municipal Boroughs Act, 1925, Crown buildings must be beneficially occupied. In England where Crown buildings are not now rateable to the general rate, beneficial occupation is defined with reference to the rateable occupation of buildings other than Crown buildings. "In order to constitute rateable occupation there must be a use and enjoyment which is or is capable of being beneficial; the test of beneficial use is not whether a profit can be made but whether the use is of value". (Halsbury Vol 27 page 352). E.g. a malt-house which had been closed down idenfinitely and contained machinery was held not to have been beneficially occupied. Again, a building may be valueless because its user in any reasonable way is in effect prohibited for the time being by

statute. It does not appear that when applied to Crown buildings in India the term 'beneficially occupied' can be interpreted differently from the way it has been interpreted in England when applied to non-Crown buildings. If Therefore use of the buildings is of value to His Majesty's Forces, as presumably it is, the buildings will be beneficially occupied and liable for a contribution so far as section 74 is concerned. The view taken by C.D. in its note of 6th July 1944 is correct.

XXXXX.

Sd /- P.N. M.

2/8/44.

Remembrancer of Legal Affairs.

U.O. to C.D. No. 5936 dated the 26th August 1944.

N.V.D.
11/7
40.

Office of the P.L.E.

The first question for the consideration of the P.L.A. is whether a municipality can contribute to "The Kasturbai Gandhi National Memorial Fund".

2. It appears from the statement of Mr. Gandhi published in the issue of the Time of India dated 4th October 1944 that the Kasturba Gandhi National Memorial Fund is to be utilised for the education and welfare of women and children in rural areas. "75 per cent. of the money collected from any particular area would be spent in that area not being towns and cities and the remaining 25 per cent. would go to the central fund." If disposal of the Kasturaba Gandhi National Memorial Fund in the manner stated above is authentic, it means that cities and towns would be excluded from the benefit of the Fund in which case any contribution from a municipal fund to "The Kasturab Gandhi National Memorial fund" would not be permissible (see proviso to section 52 of the Bombay District Municipal Act, 1901, and section 66 of the Bombay Municipal Boroughs Act, 1925).

3. The next question for consideration is whether Local Boards or Panchyats can contribute to "The Kasturba Gandhi National Memorial Fund."

4. Section 77 of the Bombay Local Boards Act, 1923, provides that expenditure by the local boards out of the local fund shall, save as otherwise provided by this Act, be made within the areas respectively subject to their authority only, but may, where it does not exceed rupee two hundred with the sanction of the Collector and where it exceeds rupees two hundred with the sanction of the Commissioner be made outside that area for any of the purposes of this Act.

5. In his opinion No. 498, dated 6-1-1936, the P.L.A. opined: "The Contribution by Local Boards

al Boards towards the Boy Scout Fund can legally be made under clauses (1) nd (n) of section 50 of the Bombay Local Boards Act, 1923, but in as much as some part, at any rate, of such contribution will be incurred within municipal limits, the expenditure on t e contribution will be made outside the area subject to the authority of the Boards and consequently the sanction of the Collector if the contribution does not exceed Rs. 200/- and that of the Commissioner if it exceeds that sum will be necessary und er section 77 of the Act." That opinion of the P.L.A. will apply to the contribution by Local Boards to "The Kasturba Gandhi National Memorial Fund". Since according to the scheme the fund is to be utilised for the education and welfare of women and children which is one of the purposes of the Local Boards Act and some part of the contribution earmarked for the central fund is likely to be sent outside the local area, the sanction of the Collector if the contribution does not exceed Rs. 200 and that of the Commissioner if it exceeds Rs. 200 would be free from legal objection. The Panchayats can also contribute to "The Kasturba Gandhi National Memorial Fund" with the previous sanction of the district local board under subsection (3) read with sub-section (2) of section 26 of the Bombay Village Panchayats Act, 1933. The view taken by Secretary, G.D. at p. 17 ante is correct.

Id/- P.N.M. 19/10/44.

Remembrancer of Legal Affairs.

UR. to G.D., No. 170-P-Confl. dated the 19th October 1944.

N.V.D.
11/7
4c.

Office of the P.I.A.

I think the view taken by the Collector of West Khandesh is correct. Mr. Badgujar as Councillor of the Dhulia Borough Municipality is alleged to have absented himself, without leave of the Municipality, during four successive months from the meetings of the Municipality. This default on his part was not noticed till after he was elected President of the Municipality. Section 28 of the Municipal Boroughs Act, 1925 lays down inter alia that if a Councillor during the term for which he has been elected, not being a President absents himself during four successive months from the meetings of the Municipality, except with the leave of the Municipality, he shall be disabled from continuing to be a Councillor and his officer shall be disabled from continuing to be a Councillor and his office shall become vacant. The authority competent to decide whether a vacancy has occurred shall be the Collector and until the Collector decides that the vancancy has arisen, the Councillor shall not be desabled from continuing to be a Councillor. The Collector having decided on 10-10-1944 that Mr. Badgujar had incurred disqualification as Councillor by reason of his having absented himself without leave from four successive meetings of the Municipality his office became vacant from that date. The fact that he was President of the Municipality on that date will not it seems affect the legal position for he did not absent himself from the meetings as President but only as Councillor. There is a separate provision in the Act relating to the disqualification of a President when he absents himself from the Borough in such manner as to be unable to perform his duties as President (vide section 22). Section 23 specifically lays down that in the event of the

President having ceased to be a Councillor under section 28(1) previous to the expiry of the term of office as President, the vancancy shall be filled up by election of some other Councillor thereto. Consequently neither section 28(1)(d) nor his election as President will save Mr. Badgujar's disqualification as Councillor. If he is disqualified from continuing as Councillor, as has been decided by the Collector, he will automatically cease to be President under section 25.

Id/- P.N.N. 7/11/44.

Remembrancer of Legal Affairs.

U.F. to G.D. No. 7758 dated the 7th November 1944.

N.W.D.
11/7
4c.

R.I.No.9039/24-19-44.

Submitted with reference to G.D. office note dated 21-10-1944 approved by the D.S. at P. 14 ante and D.L.A.'s opinion to the G.D. No. 5846, dated the 19-8-1944.

2. The papers are again referred to the D.L.A by the G.D. for advice on the remarks of the Commissioner N.D. , in his No. M.U. No 540, dated 9-10-1943 at P. 13, in view of the concluding portion of the said opinion of the D.L.A.

3. In the concluding portion of the said opinion of the G.D. No; 5846 dated 19-8-1944, the D.L.A. objected to the proposed lease on the ground that trolley lines across a street are an encroachment and it is usually a very difficult task to find legal justification for leases which permit the laying of the trolley lines. The papers forwarded by the Commissioner N.D. at page 1-12 and the remarks made by him at P. 13 do not overcome this objection (cf. 152 of the Bombay Municipal Boroughs Act, 1925). The same reasons, that "the land over which the tolley lines are to be laid will continue to be used as a street even if the trolley lines are allowed, that the use of the lines will be occasional and temporary and the public will not be inconvenienced as in the case of railway crossings and that there is no question of variation of the scheme in this case as no change is to be made in the assignment " have again been urged. These reasons were already taken into account by the D.L.A in para. 2 of his opinion No. 5846, dated 19-8-1944. If approved, G.D. may therefore, be informed that the D.L.A. sees no reason to change his ex opinion No. 5846, dated 19-8-1941, in the light of the remarks made by the Commissioner N.D. in his No. M.U.N. 540

dated 9-10-1944, at p. 13 ante.

Td/- B.D.P.
9/11/44.

S.A.S.

The laying of trolley lines on a public street amounts to a nuisance even if the use of such lines be occasional and temporary. Their lease would therefore be not legally justificable.

Td/-P.T.K.

A.I.F.

I agree.

Reply may be S.A.S's note.

Td/- P.S.H. 13/11.

P.L.A.

I Concur.

Td/- P.N.H.
15/11/44.

U.P. TO G:D. No. 8030 dated the 17th ~~August~~ November 1944.

N.V.D.
11/7
4c.

Office of the P.L.A.

Recently Municipal assessment on mill property in Sholapur has been raised from Re. 1 to Rs. 4 per 100 square feet. The mills now complain that this increase is excessive and they did not have sufficient notice of it. The P.L.A. is requested to advise (a) whether Government can suspend the operation of G.R. G.L. No. S 91(87), dated the 1st June 1944 approving the revised rules made by the Sholapur Municipality for the modifications in the levy of the general rate and the general water rate, in the case of mills, factories, etc., and (b) if it is not possible to do so, whether the proper course would be to inform the Sholapur Municipality of the Complaint made by the Mills owners in respect thereof and to ask it to show cause why actionshould not be taken under section 102 of the Bombay Municipal Borough Act, 1925 (Bom. XVIII of 1925).

2. Under clause (b) of section 75 of the Bombay Municipal Boroughs Act, 1925 read with clause (b) of section 24 of the Bombay General Clauses Act, 1904 it was for the Sholapur Municipality to determine the manner of publication and since the publication was made by it in the usual manner, it would not be legally feasible for Government to impugn the validity of that publication merely on the ground that the "Kalpataru" in which the draft rules were published has a very small circulation. Government having once sanctioned the rules by a notification would not be competent to rescind those rules by withdrawing that notification except on the request of the Municipality after following the prescribed procedure. If Government is convicd

convinced that the rate leviable under the amended rules is unfair in its incidence, there would be no legal objection to Government suspending the levy thereof under section 102 and the words "at any time" in that section warrant it even though the rules have been recently sanctioned by Government.

Sd/- A.N. .

23-12-1944.

Remembrancer of Legal Affairs.

N.W. to A.D., No. 9082, dated the

23rd December 1944.

N.W.D.
11/7
4c.